In the Supreme Court of the United States

October Term, 1979

No. 79-32

HOWARD HORSLEY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

G. WILLIAM BILLS, JR.
SALLY A. FRICK
822 Frick Building
Pittsburgh, PA 15219
Attorneys for Petitioner

July 7, 1979

Financial Press Corporation, Pittsburgh

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner Howard Horsley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 7, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of June 7, 1979 (Appendix A, infra) is not yet reported. The memorandum opinion of the United States District Court for the Western District of Pennsylvania (Appendix B, infra) has not been reported.

JURISDICTION

The judgment of the Court of Appeals, attached as Appendix C, was entered on June 7, 1979, after rehearing en banc on May 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

When a guilty plea has been accepted without an on-the-record determination of the accused's understanding of the law in relation to the facts, in violation of Rule 11 of the Federal Rules of Criminal Procedure, it is not a truly voluntary plea, is a violation of the accused's right to due process of law and it is error to deny his Motion to Vacate that plea under 28 U.S.C. §2255.

Prejudice is inherent when the district court's violation of Rule 11 of the Federal Rules of Criminal Procedure involves the trial court's failure to advise an accused of the nature and elements of the charges against him and to which he is pleading guilty.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part as follows:

> No person shall be held to answer for a capital or otherwise infamous crime... nor be deprived of life, liberty, or property, without due process of law;

28 U.S.C. §2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT OF THE CASE

1. On April 29, 1976, Petitioner Howard Horsley pleaded guilty in the United States District Court for the Western District of Pennsylvania to conspiracy to distribute a controlled substance in violation of 21 U.S.C. §846. Mr. Horsley was charged in an indictment at Criminal No. 75-182 with conspiracy and distribution of a narcotic drug and controlled substance. At the hearing held on Mr. Horsley's change of plea, the district judge questioned Petitioner concerning his out-of-court reading of the indictment and his understanding of the charges (T 2). The court further questioned Mr. Horsley as to his understanding of various rights which he was waiving: trial by jury, confrontation of witnesses, self-incrimination (T 4). The district court also inquired in the plea negotiations and Mr. Horsley's understanding of the plea he was entering:

Q. Has your attorney indicated to you that there has been talk with the United States Attorney about dismissing one of the counts if you pleaded guilty, or, when you pleaded guilty?

A. No, sir.

Q. He didn't talk to you about that?

A. Not about dropping the charges. I just pleaded guilty to everything.

Q. Sir?

A. I just pleaded guilty to everything.

Q. You are pleading guilty?

A. To one count.

Thereafter, without mentioning the elements of the crime of conspiracy, the acts charged here, the co-

conspirator, the period of time of the alleged conspiracy, or ascertaining that Petitioner was aware of the facts charged, the court accepted the plea.

2. On September 2, 1976, Petitioner was sentenced to six (6) years imprisonment to be followed by a special parole term of three (3) years. A Motion to Vacate Sentence, Judgment of Conviction and to Withdraw Guilty Plea, pursuant to 28 U.S.C. §2255, was filed by Petitioner on August 1, 1977. By memorandum order dated June 14, 1978, that Motion was denied and Petitioner appealed to the United States Court of Appeals for the Third Circuit.

3. After original hearing before a panel of the Court of Appeals on January 9, 1979, the Court scheduled rehearing en banc on May 17, 1979. By opinion and order dated June 7, 1979, the court held that, pursuant to the opinion of this Court in *United States v. Timmreck*, 47 U.S.L.W. 4577 (May 21, 1979), Petitioner's conviction was affirmed.

REASONS FOR GRANTING THE PETITION

The district court held that, under the recent ruling of *United States v. Timmreck*, *supra*, Petitioner was not entitled to collateral relief even though the record demonstrates that the district court judge never explained to Horsley the meaning of the charge and what basic acts must be proved to establish guilt. In *Timmreck*, the Rule 11 violation concerned the failure of the district court judge to advise the accused of the existence of the special parole term, or the consequences of his plea. In *Timmreck*, the threshold requirement of the explanation of, and determination that the accused understands, the nature of the charges was fulfilled. The second requirement, after a determination that the accused knows what he did that constitutes his guilty plea, is that he understand fully the consequences of his plea;

> be valid under the Due Process Clause, it must be an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process, and is therefore void. *Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.* 394 U.S. at 466, 22 L.Ed.2d at 425. [emphasis supplied]

Under *Davis v. United States*, 417 U.S. 333 (1974), a collateral attack cannot be successful unless the petitioner suffered prejudice as a result of error by the trial court. That requirement of prejudice has been met in this case where the record is silent as to Petitioner's understanding and knowledge of the elements of the crime to which he was pleading guilty and thus the requirement of voluntariness has not been met. In *Horsley v. United States*, 583 F.2d 670 (3d Cir. 1978) the Third Circuit held that a defendant automatically suffers prejudice whenever the district court fails to comply with the nature of the charge provision of Rule 11 because prejudice inheres when an accused pleads guilty, thus convicting himself of a criminal offense, without understanding the significance or consequences of his action. The Court of Appeals failed to follow that reasoning in the instant case because of the *Timmreck* case. However, it is respectfully submitted that because *Timmreck* involved a collateral aspect of the guilty plea—the consequences—and not the plea itself *Timmreck* does not control the instant case. Because the violation of Rule 11 here is one of constitutional magnitude, going to the voluntariness of the guilty plea, reversal is mandated.

this second requirement is what was deficient in *Timmreck*. However, in the instant case, the district court judge failed to meet the threshold requirement that Rule 11 is designed to meet: an on-the-record determination that the accused is told and understands the nature of the charges to which he is entering his plea of guilty. Such a violation goes beyond that of a mere technical violation—it rises to the level of constitutional infringement.

The difference between the *Timmreck* case and the instant case thus can be seen to be that of the difference between a substantive violation and a procedural violation. The *Timmreck* case involved a violation during a guilty plea once that plea had been established; in this case, the violation goes to the plea itself—whether or not the Petitioner understood the nature of the crime as it related to his actions.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the court held that it was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. The reason underlying this holding was the nature of a guilty plea itself: a plea of guilty is more than an admission of conduct; it is a conviction in itself. Ignorance and incomprehension, which can be presumed from a silent record, might be a perfect cover-up of unconstitutionality.

Further, in *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), this Court held that Rule 11, designed to protect the foregoing interest in a guilty plea, requires strict compliance. This Court held in that case:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to

CONCLUSION

This Court should grant certiorari to review the questions presented in this Petition.

Respectfully submitted,

G. William Bills, Jr.
Sally A. Frick
822 Frick Building
Pittsburgh, PA 15219

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-2015

UNITED STATES OF AMERICA
Appellee,

v.

HOWARD HORSLEY, RONALD MILLER a/k/a Bugs,

HOWARD HORSLEY
Appellant.

Appeal From the United States District Court for the Western District of Pennsylvania

D.C. Crim. No. 75-182

Argued January 9, 1979

Before Hunter, Garth, *Circuit Judges,* and Layton,* *District Judge*

Reargued En Banc May 17, 1979

Before Seitz, *Chief Judge,* and Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbotham, *Circuit Judges*

(Opinion filed June 7, 1979)

Edward J. Schwabenland (Argued)
Robert J. Cindrich
Faye M. Gardner
Blair A. Griffith
David B. Atkins
Attorneys for Appellee

G. William Bills, Jr. (Argued)
Sally A. Frick
Attorneys for Appellant

* Honorable Caleb R. Layton, 3rd, United States District Judge for the District of Delaware, sitting by designation.

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. Howard Horsley appeals from the denial of his habeas corpus petition, which was brought under 28 U.S.C. § 2255 (1976). He contends that at his guilty plea colloquy, he was not advised personally by the district court judge of the nature of the charges against him, or of the consequences of the imposition of a special parole term.[1] Thus, he asserts that his rights under Rule 11 of the Federal Rules of Criminal Procedure were violated, and that he should be entitled to withdraw his original plea and plead anew. We believe that this case is controlled by *United States v. Timmreck,* 47 U.S.L.W. 4577 (May 21, 1979). Therefore, we affirm the denial of his petition.

I.

FACTS

2. On June 12, 1975 a two count indictment was returned against Horsley, charging him with conspiracy to distribute heroin and with distribution of heroin in violation of 21 U.S.C. §§ 846 and 841(a)(1) (1976). Horsley pleaded guilty to the conspiracy count on April 29, 1976, at which time the district court judge conducted the guilty plea colloquy here challenged. Horsley was sentenced to six years imprisonment, plus a mandatory three year special parole term. He did not appeal from his judgment of conviction.

3. Fifteen months later, Horsley filed a habeas corpus petition, contending that he was entitled to withdraw his guilty plea because the judge who accepted the plea committed errors in the Rule 11 colloquy. The district court denied him relief.

1. Horsley also claims that the district court erred in failing to determine whether he understood and consented to the plea bargain negotiated by his attorney on his behalf. We have reviewed this claim and find it to be without merit.

4. Horsley's first contention on appeal is that he was not informed by the judge of the nature of the charges against him. His challenge arises out of the following exchanges during the guilty plea colloquy:

By MR. ATKINS [Assistant U.S. Attorney]:

Q. Mr. Horsley, have you received a copy of the indictment?

A. Yeah.

Q. Okay. And have you read it?

A. Yes, I have.

Q. And have you discussed it with your attorney?

A. Yes, I have.

Q. Okay. And do you understand what you are being charged with?

A. Uh-huh.

Q. Okay. Do you want the indictment read to you, or do you waive a formal reading of the indictment?

MR. GAITENS [Defense Counsel]: We will waive the formal reading, your Honor. We have had an opportunity to examine it.

THE COURT: And the Defendant says so too?

THE DEFENDANT: Yes, your Honor.

THE COURT: You know what is in it?

THE DEFENDANT: Yes, sir.

THE COURT: You have talked this over with your attorney?

THE DEFENDANT: I have.

5. Shortly thereafter, the district court judge again directed questions to the defendant about the indictment.

Q. And do you understand what the indictment says?

A. Yes, sir.

Q. And you do have the help of your counsel in explaining to you what the indictment means?

A. Yes, your Honor.

Q. And what it charges and the consequences of a plea?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

6. The final exchange relating to the indictment occurred as follows:

[By the Court]

Q. And from the presentence report, as I have the record before me, you refused to admit any guilt when questioned by the Probation Officer. Do you still refuse to admit your guilt—

A. No, sir.

Q. (continuing)—to count one here?

A. No, sir.

Q. Then you have changed your mind in that regard?

A. Yes, sir.

Q. And you now say that you are guilty?

A. Yes, sir.

Q. Will you tell the Court why you pleaded guilty?

A. Because I committed a crime.

Q. Sir?

A. Because I collaborated with another—

Q. I don't understand you and I can't hear you. Louder.

A. I say that I pleaded guilty because I was guilty of the charge.

Q. All right, you pleaded guilty because you are guilty?

A. Yes, sir.

7. Horsley also claims that he was not advised that the special parole term required by 21 U.S.C. §§ 841(b)(1)(A) & 846, was in addition to, rather than instead of, the fine and/or term of imprisonment provided for by the statutes. During the Rule 11 colloquy, the only reference to the special parole term provision was the following:

By Mr. Atkins:

Q. Mr. Horsley, are you aware that the possible maximum penalty on count one is a fine of not more than $25,000.00 or imprisonment for fifteen years, or both?

A. Yes, sir.

Q. And that it carries with it a three-year special parole term?

A. Yes, sir.

II.

Discussion

A. *The Nature of the Charge*

8. The record demonstrates that the district court judge never explained to Horsley "the meaning of the charge and what basic acts must be proved to establish guilt." *Woodward v. United States*, 426 F.2d 959, 962-63 (3d Cir. 1970). The judge thus failed to comply with the requirement of Rule 11 that he "personally" inform the defendant of "the nature of the charge to which the plea is offered."[2] Horsley does not claim, however, that he did not *in fact* understand the nature of the charge to which he pled, or that, but for the court's failure to comply strictly with the Rule, he would not have pled guilty.[3]

2. Rule 11(c)(1) provides:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant *personally* in open court and inform him of, and determine that he understands, the following:
>
> (1) *the nature of the charge* to which the plea is offered, the mandatory minimum penalty provided by law, if any, *and the maximum possible penalty provided by law.* (emphasis added).

3. Indeed, the record establishes that Horsley did read the indictment and discuss it with counsel, *see* ¶ 4 *supra;* that Horsley informed the court that he understood the charge against him, *see* ¶ 4 *supra;* and that Horsley stated that he was pleading guilty because he "collaborated with another," and because he "committed a crime." *See* ¶ 6 *supra.*

Therefore, under the ruling of *United States v. Timmreck*, 47 U.S.L.W. 4577 (May 21, 1979), Horsley is not entitled to collateral relief.

9. In *Timmreck*, the petitioner moved, pursuant to 28 U.S.C. § 2255, to vacate his sentence on the ground that the district court judge failed to inform him during the Rule 11 colloquy of the existence of the mandatory special parole term required by the applicable statute. The petitioner did not, however, allege any specific prejudice arising out of the asserted violation of the Rule. The Supreme Court denied his claim, holding that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 47 U.S.L.W. at 4579, quoting *Hill v. United States*, 368 U.S. 424, 429 (1962). The Court reasoned that habeas corpus relief is available only to protect against "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." 47 U.S.L.W. at 4578, *quoting Hill*, 368 U.S. at 428. And the Court concluded that petitioner could not claim that a "fundamental" defect or omission occurred when he did not "argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." 47 U.S.L.W. at 4578.

10. We are convinced that no principled distinction between *Timmreck* and this case can be drawn. Thus, because Horsley failed to allege specific prejudice [4]—i.e., failed to maintain that he did not understand the nature of the charge to which he pled, or that he would have pled not guilty but for the district court's error—collateral relief is not available to him.

4. *Timmreck* plainly stands for the principle that the petitioner has the burden to produce evidence of actual prejudice. *Timmreck* is silent, however, regarding which party has the burden of persuasion if petitioner meets his production burden. We need not decide that question here, because Horsley failed to make any contention of actual prejudice, and because, regardless of which party had the burden of persuasion, the evidence was abundantly clear that Horsley suffered no specific prejudice. *See* note 2 *supra*.

11. At argument, Horsley's counsel relied on *Horsley v. United States*, 583 F.2d 670 (3rd Cir. 1978) (Horsley I),[5] which also involved a failure of the district court to comply with Rule 11's "nature of the charge" requirement, and which is factually indistinguishable from this case. In *Horsley I*, we recognized that under *Davis v. United States*, 417 U.S. 333 (1974), a collateral attack cannot be successful unless the petitioner "suffered prejudice" as a result of error by the trial court. 583 F.2d at 672. We held, however, that "prejudice inheres when an accused pleads guilty, thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 673, *quoting Berry v. United States*, 412 F.2d 189, 191 (3d Cir. 1969). Moreover, we created what was in effect an irrebuttable presumption that if the record does not show that the defendant was "apprised of facts that constitute commission of a crime," 583 F.2d at 674 n.6, then the defendant did not, for purposes of Rule 11, understand the nature of the offense to which he pled. In sum, *Horsley I* stands for the proposition that a defendant automatically suffers prejudice whenever the district court fails to comply with the "nature of the charge" provision of Rule 11. We conclude that this approach is inconsistent with *Timmreck*, and therefore we are compelled to reject it.

B. *The Consequences of the Special Parole Term*

12. Horsley also claims that the judge who accepted his guilty plea failed to advise him that the special parole term required by the statute was to be imposed in addition to, rather than in lieu of, a fine, imprisonment or ordinary parole. In addition, although Horsley does not raise this issue on appeal, the record indicates that the existence of the special parole term was mentioned at the colloquy by Assistant U.S. Attorney Atkins, and not by the judge himself.

5. Howard Horsley was also the defendant in *Horsley I*, although that case concerned a guilty plea to a different drug related indictment.

13. Even assuming, however, that a Rule 11 violation did occur—an assumption which we make for the sake of argument only—Horsley is plainly not entitled to collateral relief. In *Timmreck*, the judge omitted *any mention* during the Rule 11 colloquy of the mandatory special parole term. *See* 47 U.S.L.W. at 4578. Yet, the Supreme Court held that this omission—surely greater than that which existed here—did not entitle the petitioner to habeas relief absent an allegation of actual prejudice. Because Horsley also failed to go forward with evidence of specific prejudice, *Timmreck* is dispositive of his claim.

CONCLUSION

14. The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

HOWARD HORSLEY

Criminal No. 75-182

MEMORANDUM

ROSENBERG, *District Judge*

The defendant, Howard Horsley, filed a motion to vacate sentence and judgment of conviction, and to withdraw guilty plea, after a Change of Plea and Sentence on April 29, 1976 and the Final Sentence on September 2, 1976. This action was commenced under 21 U.S.C. §846, 841(a) and 18 U.S.C. §2. The Government in response denies the averments contained in the motion and specifically refers to the transcripts of both hearings. Copies of the transcripts appear herewith as Appendix A and Appendix B.

Originally, the sentencing judges in the district courts followed the Federal Rule of Criminal Procedure 11 until the Court of Appeals in *United States of America v. Simon Hawthorne*, 502 F.2d 1183, C.A. 3, 1974, remanded for further questioning of the defendant of his understanding of counsel agreements and that sentence be imposed only thereafter.

Finally, a revision of Rule 11 became effective as it considered the procedural counsel agreements on pleas

between the prosecuting attorney and counsel for the defendant, and as such required special questioning as was done in the instant case. In addition to the possible sentence which the defendant's plea of guilty might incur, the prosecution attorney asked him not only whether he understood the number of years and fine which could be imposed but also asked:

"Q. And that it carries with it a three-year special parole term?

A. Yes, sir."

Now, in the motion to vacate sentence, two years later, the defendant complains that prior to the entry of his plea of guilty he was not apprised of the "special parole term" of three years and for that reason the sentence should be set aside because it creates "manifest injustice". He cites in support of such contention, *Roberts v. United States*, 491 F.2d 1236, C.A. 3, 1973.

The defendant here was informed not only of the possible maximum penalty but of the special parole of three years, and his answer to both was "Yes, sir". Thus, the defendant was told the worst to expect and was made aware of the "outer limits of punishment".

At the April 29, 1976 hearing the defendant was asked,

"Q. Mr. Horsley, are you aware that the possible maximum penalty on count one is a fine of not more than $25,000.00 or imprisonment for fifteen years, or both?

A. Yes, sir.

Q. And that it carries with it a three-year special parole term?

A. Yes, sir." (at page 3)

At the final hearing, after the study, on September 2, 1976, the following occurred,

"Mr. Griffith: I think the statute provides for a three-year special parole term, Your Honor.

The Court: A three-year special parole term will also be imposed *thereafter*." (Emphasis added) (at page 22).

Again at the April 29, 1976 hearing, this occurred:

"Q. And you do have the help of your counsel in explaining to you what the indictment means?

A. Yes, your Honor.

Q. And what it charges and the consequences of a plea?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir." (at pages 5 and 6)

Both transcripts indicate that the defendant had competent representation by his attorney, Larry Gaitens, and there is no question but what the lawyer understood and that the defendant also understood the consequences of a plea of guilty.

Hawthorne, supra, decided by the Court of Appeals in 1974 and Rule 11 of the Federal Rules of Criminal Procedure adopted on July 31, 1975, were what I followed in hearing the plea of Howard Horsley.

While it is true that *Roberts, supra*, was decided in 1973, the fact that the sentencing court was not aware of its legal rulings, was a matter which counsel for the defendant should have raised in the same way an attorney raises any principle of law in any case. In any event, a failure to call this to the attention of the court could not be compounded into an error in 1978, two years later.

The meaning of the sentencing was clear even though at the sentence I did not explain the fullest significance of the maximum imprisonment including the special parole. The meaning was not lost either on the defendant or his counsel. In any event, to accept the attack at this time—two years later—by an understanding defendant through his understanding attorney, must of necessity, stretch the technical approach to a never ending finality of any case where one pleads guilty intentionally and understandingly as appeared in this case.

Even the new and later instructions by the Court of Appeals, when a defendant enters a plea of guilty, the long line of detailed questions which the sentencing judges are now required to address to the defendant never anticipated the technical objection raised in the instant motion of the defendant of lack of understanding. A number of cases in other Circuits deem the omission of the special parole term information as not being critical in dispensing criminal justice. *United States v. Hamilton*, 553 F.2d 63, 66, C.A. 10, 1977, cert. den. ___ U.S. ___, 1978; *United States v. Ortez*, 545 F.2d 1122, 1123, C.A. 8, 1976; *United States v. Rodriguez*, 545 F.2d 75, 76, C.A. 8, 1976; *Johnson v. United States*, 542 F.2d 941, 942, C.A. 5, 1976; *McRae v. United States*, 540 F.2d 943, 946, C.A. 8, 1976, cert. den. 429 U.S. 1045 (1978); *Bachner v. United States*, 517 F.2d 589, 597 C.A. 7, 1975.

Since the record itself contradicts averments of the defendant in the motion to vacate sentence, judgment of conviction and to withdraw guilty plea, the motion of the defendant will be denied.

ORDER OF COURT

AND NOW, TO-WIT, this 14th day of June 1978, for the reasons set forth in the foregoing Memorandum, the

defendant's Motion to Vacate Sentence, Judgment of Conviction and to Withdraw Guilty Plea, is hereby denied.

/s/ LOUIS ROSENBERG

United States District Judge

cc:
Blair Griffith, U.S. Attorney
David Atkins, Assistant U.S. Attorney

G. William Bills, Jr., Esq.
822 Frick Building
Pittsburgh, Pennsylvania 15219

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2015

UNITED STATES OF AMERICA

vs.

HOWARD HORSLEY
RONALD MILLER a/k/a Bugs

Howard Horsley,
Appellant

(D.C. Criminal No. 75-182)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*.

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on January 9, 1979, and reargued before the Court en banc on May 17, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 14, 1978, be, and the same is hereby affirmed. Costs taxed against appellant.

/s/ THOMAS J. QUINN

Clerk

June 7, 1979

Certified as a true copy and issued in lieu of a formal mandate on June 29, 1979.

Test: /s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari were served upon the following by first class mail, postage prepaid, this 6th day of July, 1979:

Office of the Solicitor General
Room 5143
Main Justice Building
10th and Constitution Avenues, N.W.
Washington, D.C. 20530

Robert J. Cindrich, Esq.
United States Attorney
633 U.S. Post Office and Courthouse
Pittsburgh, PA 15219

G. WILLIAM BILLS, JR.